

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

EQUITY FUNDING LLC,

Plaintiff,

v.

ILLINOIS UNION INSURANCE
COMPANY, an Illinois Corporation,

Defendant.

ILLINOIS UNION INSURANCE
COMPANY, an Illinois Corporation,

Third-Party Plaintiff,

v.

WENTWOOD ROLLINGBROOK, L.P.,
a Delaware limited partnership; and
BANK OF AMERICA, N.A., a National
Banking Association,

Third-Party Defendants.

CASE NO. C12-5359 BHS

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

This matter comes before the Court on Defendant Illinois Union Insurance Company's ("IUIIC") motion for summary judgment (Dkt. 45). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion for the reasons stated herein.

I. PROCEDURAL HISTORY

On April 23, 2012, the Court initiated this action by severing Plaintiff Equity Funding, LLC's ("Equity") claims from a related action. Dkt. 1. Equity alleges that, because of an improper endorsement, it did not receive insurance proceeds from IUIIC. *Id.* ¶¶ 5.1–5.6. Equity claims that the contract of insurance requires IUIIC to protect the interests of Equity and Equity has been damaged because "it has not received the benefits of the contract." *Id.* ¶¶ 5.2, 5.5.

On October 30, 2012, IUIIC filed an amended answer and included a third-party complaint against Third-Party Defendant Bank of America, N.A. ("BANA"). Dkt. 34 ("Complaint").

On January 23, 2012, IUIIC filed a motion for summary judgment. Dkt. 45. On February 13, 2013, Equity responded. Dkt. 51. On February 20, 2012, IUIIC replied. Dkt. 53.

II. FACTUAL BACKGROUND

The material facts are undisputed and have been stipulated to by Equity and IUIIC. Dkt. 27. They are as follows:

IUIIC issued a policy for the period of November 27, 2007 to November 27, 2008, to Graoch Associates Limited Partnership ("Graoch"). The policy insured properties owned by Graoch and its related entities including an apartment complex known as Creekside in Baytown, Texas that Wentwood Rollingbrook, LP ("Wentwood") owned. The policy has a standard suit limitation provision requiring that legal action against IUIIC be brought within two years after damage to the insured property occurred:

1 **Legal Action Against Us.** No one may bring a legal action against
2 us under this Coverage Part unless:

3 1. There has been full compliance with all of the terms of this
4 Coverage Part; and

5 2. The action is brought within 2 years after the date on which the
6 direct physical loss or damage occurred.

7 Dkt. 19, Exh. 1 (“Policy”) at 64.

8 The policy also has a Loss Payable Provision. It provides that in the event of
9 damage to property covered by the policy, IUIIC will make loss payments jointly to the
10 owner and lender:

11 **Loss Payable.** For Covered Property in which both you and a Loss
12 Payee shown in the Declarations have an insurable interest, we will:

13 1. Adjust losses with you [the named insured]; and

14 2. Pay any claim for loss or damage jointly to you [the named
15 insured] and the Loss Payee [the lender], as interests may appear.

16 Policy at 84.

17 The Loss Payable Provision further provides that all of the terms of the policy
18 apply directly to the Loss Payee: “When this endorsement is attached to the STANDARD
19 PROPERTY POLICY CP 00 99 the term Coverage Part in this endorsement is replaced
20 by the term Policy.” The Lender’s Loss Payable Agreement then provides: “All of the
21 terms of this Coverage Part will then apply directly to the Loss Payee.”

22 Equity’s predecessor, Centrum Financial Services (“Centrum”), was the lender on
the Creekside property and the loss payee for Creekside scheduled on the policy.

On or about September 13, 2008, hurricane Ike damaged the Creekside property.
At the time, Derek Edmonds, CEO of Centrum, and Bruce Berreth, President of Centrum,

1 knew of the damage to Creekside and that such damage was insured. They have each
2 stated:

3 We became aware that Creekside Apartment Complex was hit by
4 Hurricane Ike when it made landfall in the fall of 2008. . . . We were aware
5 that various insurance claims were being submitted under the policy of
6 insurance for damaged [sic] caused by Hurricane Ike.

7 Dkt. 19-2, Declaration of Derek Edmonds, ¶¶ 4 & 5; Dkt. 19-3, Declaration of Bruce
8 Berreth, ¶¶ 4 & 5.

9 In October 2008, Graoch, on behalf of Wentwood, requested that IUIIC advance to
10 it \$750,000 for damage sustained to Creekside due to Hurricane Ike. Wentwood
11 requested that the check be sent to its risk manager in Tacoma and be made jointly
12 payable to “Wentwood Rollingbrook LP and Centrum Financial Services.” IUIIC
13 prepared and delivered the check as requested by its insured and, in accordance with the
14 policy terms, made the check jointly payable to Wentwood and Centrum.

15 Gary Gray, controller of various Graoch entities, informed Centrum’s CEO, Derek
16 Edmonds, of the forthcoming IUIIC check on October 9, 2008:

17 Gray: Subject: Insurance !! Hey there—I am getting an initial
18 insurance draw first thing in the morning on Creekside Apartments
19 (Wentwood Rollingbrook). As per insurance custom, it is a two party
20 cheque, payable to Wentwood Rollingbrook and Centrum. Is it OK if I
21 cruise in to see you guys tomorrow in order to get endorsed, in our bank,
22 and get guys paid? Thanks much!

 Edmonds: Hi Gary, Sure, no problem. I’ll be around all day
tomorrow, so feel free to come by anytime. . . .

Dkt. 46, Declaration of John L. Williams, Exh. A.

 Wentwood’s representative received IUIIC’s \$750,000 check on October 10, 2008
and endorsed it on Wentwood’s behalf. Wentwood presented the check to Bank of

1 America for deposit in a Wentwood account. In addition to Wentwood's endorsement,
2 the check bore a stamp with Centrum's name and address. Bank of America accepted the
3 check for deposit into Wentwood's account. Bank of America was also IUIC's bank.
4 Bank of America transferred \$750,000 to Wentwood's account and debited IUIC's
5 account in that amount.

6 **III. DISCUSSION**

7 In this case, IUIC moves for summary judgment because Equity's claim is time
8 barred and because IUIC did not breach the insurance contract. As a threshold matter,
9 Equity argues that the motion should be denied because the "claims are based on the
10 conversation of the payment check, not the contract of insurance." Dkt. 51 at 10. No
11 matter how liberally one reads the operative complaint, the only claim asserted by Equity
12 against IUIC is the breach of contract claim. Dkt. 1, ¶¶ 5.1–5.6 ("CLAIMS AGAINST
13 ILLINOIS UNION"). Therefore, any argument based on a claim against IUIC for
14 conversion is without merit because it is outside the scope of the pleadings.

15 Equity also argues that "[t]his lawsuit involves a single policy of insurance." Dkt.
16 51 at 10. Equity's complaint explicitly contradicts this statement because it identifies
17 IUIC's contract of insurance as the "Primary Policy" (Dkt. 1, ¶ 3.2) and RSUI's contract
18 of excess insurance coverage as the "Policy" (*id.*, ¶ 3.1). Therefore, Equity's arguments
19 based on a single policy are completely without merit. The Court will more substantively
20 address the remaining issues.

1 **A. Standard**

2 Summary judgment is proper only if the pleadings, the discovery and disclosure
3 materials on file, and any affidavits show that there is no genuine issue as to any material
4 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
5 The moving party is entitled to judgment as a matter of law when the nonmoving party
6 fails to make a sufficient showing on an essential element of a claim in the case on which
7 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317,
8 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole,
9 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*
10 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must
11 present specific, significant probative evidence, not simply “some metaphysical doubt”).
12 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists
13 if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or
14 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477
15 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d
16 626, 630 (9th Cir. 1987).

17 The determination of the existence of a material fact is often a close question. The
18 Court must consider the substantive evidentiary burden that the nonmoving party must
19 meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
20 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
21 issues of controversy in favor of the nonmoving party only when the facts specifically
22 attested by that party contradict facts specifically attested by the moving party. The

1 nonmoving party may not merely state that it will discredit the moving party's evidence
2 at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W.*
3 *Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,
4 nonspecific statements in affidavits are not sufficient, and missing facts will not be
5 presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

6 **B. Suit Limitation**

7 “[I]nsurance companies have the opportunity to limit their exposure by including
8 express suit limitation provisions that comply with RCW 48.18.200(1)(c).” *Schwindt v.*
9 *Commonwealth Ins. Co.*, 140 Wn.2d 348, 359 (2000). RCW 48.18.200(1)(c), which
10 governs the validity of suit limitation clauses in insurance policies, authorizes limitation
11 clauses if they are not for “a period of less than one year from the date of the loss.”

12 In this case, IUIC argues that “the Court should give effect to the contractual suit
13 limitation” Dkt. 53 at 5. The Court agrees. The Policy provides that any action
14 must be “brought within 2 years after the date on which the direct physical loss or
15 damage occurred.” Policy at 64. It undisputed that the damage occurred in September
16 2008 and that Equity filed this action in December 2011. It is clear that the suit was filed
17 more than two years after the damage occurred. Therefore, unless some exception
18 applies, Equity's suit is barred by the suit limitation provision.

19 Equity argues that the suit limitation period should be tolled under the discovery
20 rule. Dkt. 51 at 8–10. A cause of action accrues when an injured party knows, or in the
21 exercise of due diligence should have discovered, the factual basis of the cause of action.
22 *Beard v. King County*, 76 Wn. App. 863, 867 (1995). Even if the discovery rule applied

1 to rewrite the suit limitation provision, Equity's officers knew when the damage occurred
2 and knew that the initial installment check issued. Based on that knowledge, Equity's
3 claim against IUIC accrued in October 2008 at the latest, which is more than two years
4 before this suit was filed. Therefore, the Court grants IUIC's motion for summary
5 judgment because Equity's breach of contract claim is time-barred by the Policy's suit
6 limitation provision.

7 **C. Breach of Contract**

8 Even if the Court ignores the suit limitation provision, IUIC has shown that it fully
9 performed its obligations under the contract. "If a check is payable to more than one
10 payee, delivery to one of the payees is deemed to be delivery to all of the payees." RCW
11 62A.3-420, Comment 1. Once a jointly payable check has been paid, it extinguishes the
12 debt for which it was presented. RCW 62A.3-310(b)(1).

13 In this case, IUIC met its obligations under the contract and its debt was
14 extinguished. It's undisputed that the jointly payable check was delivered to Wentwood
15 and was paid by Bank of America. Therefore, contrary to Equity's position (Dkt. 51 at
16 13), there are no questions of fact as to these two facts. Although Equity provides some
17 non-binding authority to the contrary (Dkt. 51 at 12-13), Washington's commercial code
18 is clear and IUIC has provided overwhelming authority for the proposition that its
19 obligations have been fulfilled and its debt has been discharged (Dkt. 45 at 11-16). To
20 hold IUIC responsible for allegations of improper endorsements imposes unjust
21 obligations on the issuer of a check. Therefore, the Court grants IUIC's motion for
22 summary judgment on Equity's breach of contract claim because IUIC's "obligation has

1 been discharged and [Equity's] cause of action rests ... against Wentwood or Bank of
2 America." Dkt. 53 at 12.

3 **IV. ORDER**

4 Therefore, it is hereby **ORDERED** that IUIC's motion for summary judgment
5 (Dkt. 45) is **GRANTED**.

6 Dated this 14th day of March, 2013.

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9 BENJAMIN H. SETTLE
United States District Judge